



**IN THE
SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, A.D. 1976

No. 76-1082

Docketed February 4, 1977

IN THE MATTER OF:

**MEREDOSIA HARBOR & FLEETING SERVICE, INC.
and RIVER ROAD MARINE REPAIR, INC.**

**FARMERS & TRADERS STATE BANK
OF MEREDOSIA,**

Petitioner,

v.

**ROBERT M. MAGILL, TRUSTEE,
Respondent.**

**RESPONSE TO PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

**JAMES L. MAGILL
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Attorney for Respondent**

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STATEMENT OF THE CASE

John D. Rasco formed two corporations in 1970: Meredosia Harbor and Fleeting Service, Inc. and River Road Marine Repair, Inc. River Road Marine Repair, Inc. was a wholly owned subsidiary of Meredosia Harbor and Fleeting Service, Inc. The purpose of both corporations was to build

and repair boats. After having been incorporated, the corporations commenced construction on two river tow boats, the Mary Ann and the Anita Maria.

In early 1970, Mr. Rasco engaged in a fraudulent scheme to wrongfully obtain funds from the Farmers & Traders State Bank of Meredosia and the Schuyler State Bank of Rushville; said acts required the cooperation of officers of both banks. At the same time, Mr. Rasco opened accounts in Quincy, Illinois and Tulsa, Oklahoma. During the summer of 1970, he commenced kiting checks among the banks. The Meredosia Bank was aware of Rasco's check kiting as early as July 1970, and the Rushville bank realized, in early 1970, that Rasco was insolvent and in an overdraft position. The check kiting scheme was discovered by bank examiners who were auditing the Farmers and Traders State Bank of Meredosia in early September 1970. The Schuyler State Bank of Rushville suffered a loss of \$130,000 and the Meredosia Bank suffered a loss of \$170,000.

Mr. Rasco, as well as the two banks, knew that bankruptcy was imminent. In order to protect the bank's position, the bank attempted to acquire a perfected lien on the Mary Ann and Anita Maria, both of which were incomplete on October 1, 1970. Among the requirements for a perfected security interest in the two vessels, was that the mortgagor had to execute an affidavit stating that "the mortgage is made in good faith and without any design to hinder, delay or defraud any existing or future creditor of mortgagor or any lienor of the mortgaged vessel." Neither the mortgagor nor the mortgagee could have believed this to be true.

On November 6, 1970, the mortgagor, River Road Marine Repair, Inc. and Meredosia Harbor and Fleeting Service,

Inc. filed reorganization petitions under Chapter XI of the Bankruptcy Act. An adjudication of bankruptcy was entered on January 4, 1971. Ten days thereafter, the Trustee petitioned for leave to sell both unfinished vessels and other property of the consolidated bankrupts. On February 7, 1973, the Meredosia Bank filed an objection to the Trustee's January 2, 1973 final report, indicating that it had the maritime mortgage for the two vessels in the amount of \$300,000. In March 1973, the Meredosia Bank filed a petition to reclaim the vessel or the proceeds of their sale, and a similar reclamation petition was filed in June 1973 by the Rushville bank. The Trustee defended this position that the security interest transferred by the bankrupt to the bank constituted a preferential transfer under Section 60 of the Bankruptcy Act, Chapter VI, Section 96 of the United States Code, Title XI.

The bankruptcy court found that no valid lien existed whereby the bank could claim any right to the proceeds of the trustee's sale of the two vessels owned by the bankrupt, and that the bank's attempt to acquire a mortgage on said uncompleted vessels affected a preferential transfer under Section 60 of the Bankruptcy Act. The bankruptcy court's decision was affirmed by U.S. District Court for the Southern District of Illinois, and the opinion of the district court was affirmed by U.S. Court of Appeals for the Seventh Circuit.

ARGUMENT

The argument presented by the bank in its petition to this Court for review can be summed up as follows:

When perfection of a mortgage requires an affidavit of good faith that the affiant is not attempting to hinder his other creditors, said good faith need not be present on the part of the mortgagor or mortgagee as long as the mechanics of executing the required affidavit are followed.

Reference is made to the opinion of the United States District Court wherein nine factors are listed indicating that the good faith requirement could not have been fulfilled. (Petitioners supplement to Petition for Certiorari, P. 14.)

Petitioner uses extensive space in discussing the efficacy and importance of admiralty law generally. Petitioner further states that this is an area in which there is no guidance by statute or case and that therefore this Court should establish the law for facts such as those presented herein.

The efficacy of admiralty law in the United States is not at issue as petitioner would attempt to lead this Court to believe. When the constructs of the statute outlined in the steps for perfecting a mortgage are followed, said mortgage is given preferential status and such status is appropriately honored in the Bankruptcy Court. However, where those constructs are not followed, the protection supplied by the statute cannot be made beneficial to any debtor or creditor. In the present case, there was no good faith affidavit because there could be no good faith affidavit. The undisputed evidence in the case, as explained in the opinion of the Court of Appeals, is that both parties

knew that the mortgages would be taken to the detriment of other creditors. It is the Trustee's position that in fact to uphold the petitioner's position that no good faith need be present in signing an affidavit of good faith would weaken the Ship's Mortgage Act to a great extent rather than strengthen it as petitioner proposes.

CONCLUSION

For the foregoing reasons, Trustee respectfully submits that the questions presented by petitioners are clearly insubstantial, and that the judgment of the district court should be affirmed.

Respectfully submitted,

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